Supreme Court, U. S.
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IN THE

Supreme Court of the United States

Term, 1978

No. 78-52

ALFRED R. PIERCE, *Petitioner*

v.

CAPITAL CITIES COMMUNICATIONS, INC.

and

RICHARD KELLMAN, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Henry Thomas Dolan
Counsel for Petitioner

1424 Walnut Street
Philadelphia, Pennsylvania 19102
(215) 985-1300

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

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IN THE
SUPREME COURT OF THE UNITED STATES

Term, 1978

No.

Alfred R. Pierce, *Petitioner*

vs.

Capital Cities Communications, *Inc.*

and

Richard Kellman, *Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on April 12, 1978.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania, granting defendants' Motion for Summary Judgment, is printed in the Appendix hereto, and is not yet reported, officially or unofficially.

The opinion of the Court of Appeals for the Third Circuit, affirming the judgment of the District Court, is printed in the Appendix hereto and is not yet reported, officially or unofficially.

JURISDICTION

The judgment of the Court of Appeals, printed in the Appendix hereto, was entered on April 12,1978.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1. Did not defendants' television broadcast by text and context charge plaintiff with using knowledge gained in public office to his pecuniary advantage in real estate acquisitions?

2. Was not such a charge defamatory?

3. Was the defendants' broadcast fairly and reasonably to be understood by an auditor/viewer as merely a rhetorical statement, not purporting to be one of fact?

4. Was not the defendants' broadcast fairly and reasonably capable of the innuendoes plaintiff charges it expressed?

5. Do not the plaintiff's proofs sufficiently establish that defendants made the broadcast with knowledge of the falsity of its content or with reckless disregard whether its content was true or false?

STATEMENT

In this diversity action, plaintiff, a former holder of public office (Commissioner, and sometime Chairman, of the Delaware River Port Authority), and admittedly a "public figure" within the meaning of that term in the law of defamation as expounded by decisions of this Court, notably *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), alleged he had been defamed by a television broadcast made by defendants from station WPVI-TV in Philadelphia on November 20, 1973. The District Court (Higginbotham, J.) on defendant's Motion for Summary Judgment, after viewing a video tape replay of the broadcast, and considering pleadings, depositions, answers to interrogatories, etc., pursuant to F. R. C. P. 56, decided to the contrary, and entered summary judgment for defendants. The Court of Appeals affirmed.

Station WPVI-TV is operated by the corporate defendant. The individual defendant was its employee, an investigative reporter who conceived the program, investigated some portions of the factual background of its subject, organized, prepared,and edited its content, and himself narrated its text on the air.

The program in question was a special offering entitled "Public Bridges and Private Riches". Generally, it undertook to examine certain parts of the operation of the Delaware River Port Authority, a bi-state authority created jointly by the State of New Jersey and the Commonwealth of Pennsylvania for the purpose, among others, of providing and administering bridges and rail lines across the river. Specifically, it dealt with certain business activities of the then Chairman of the Authority, Ralph Cornell, in his individual private capacity, with ownership by him and by plaintiff, together or separately, of three parcels of real estate in greater or less proximity to one of the bridges, or to the high speed passenger rail line of the authority, or to a

possible future extension of that line, and with the question whether these business activities and real estate ventures did not represent a conflict of interest between the public and private capacities of those two individuals.

Plaintiff expressly pleaded the context of the broadcast (Complaint Pars. 19, 21, 37, 39), as infusing the text with meaning damaging to his reputation, i.e., that he had used his public position for his private profit. An established authority in the communications field, by affidavit filed against the Motion for Summary Judgment, analyzed the elements of the context rendering the total effect of the broadcast defamatory to a viewer-listener. The affidavit pointed out the broadcast's sharply contrasting imagery, or images unaccompanied by spoken words, designed to heighten the contrast expressed in the title, "Public Bridges and Private Riches". The number of times and length of time that the title was held on the screen, or that the other sharply contrasting imagery was repeated, were considered by the affiant to constitute an essential element of the context.

Plaintiff pleaded eleven damaging innuendoes, based on various statements uttered in the broadcast. To both courts below, he urged that the justifiability of the pleaded innuendoes rests not only on the text of the statement themselves, but on the elements of their context pointed out above, on announcements of the program broadcast by defendants each of four days in advance, characterizing it as "shocking", and as raising the question "whether or not the Public Bridges are being run for private enrichment" (Exhibit K-18), and on defendants' widely disseminated sales sheet promising the program would tell "how through nepotism and informed land speculation, the Delaware River Port Authority seems to be run more for *private* enrichment than public interest . . . while JOE PUBLIC PAYS for it all through SUPER-TOLLS" (Exhibit K-17; emphasis in original).

The avowedly factual character of the statements broadcast is clear from defendants' own description of it, and is sufficient to preclude its being interpreted as mere rhetorical effusion or journalistic hyperbole. Kellman at deposition (Kellman A, 84) categorized his purpose as "to bring facts forward". He said his investigation of the subject went back to "early 1972" (Answer to Plaintiff 's Interrogatories, 18). The station's anchorman described Kellman as having "travelled the bridges of the Authority for 90 days", and said the result was "some incredible findings that go right into your pockets". As noted in the Opinion of the Court below, defendants in their answer to the Complaint asserted ". . . the broadcast was fairly made and presented in a proper manner after careful investigation and consisted of *true facts* (emphasis the Court's) in a matter of public interest", etc.

As demonstrating that defendants entertained serious doubts of the truth of their publication, the test enjoined by *St. Amant v. Thompson*, 390 U.S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262 for the existence of the reckless disregard of truth or falsity constituting "malice", under *New York Times v. Sullivan, supra*, plaintiff relied on admissions of defendant Kellman at deposition. Though he began preparation of the program believing it possible he would discover plaintiff had used inside official information in acquisition of land holdings, he knew before broadcast he had "no facts to support a public statement to that effect" (Kellman A, 63). He therefore refrained from such an explicit statement. Nevertheless, as to plaintiff, he questioned, rhetorically, whether "people with such interlocking interests can truly act in the public interest", and referred to him as a Commissioner "involved in projects which link (him) with Port Authority projects, and make (him) look bad if the public is told about them" (Complaint, Pars. 30, 33). Before he uttered these statements he knew plaintiff 's acquisition of ownership in any of the three parcels in question was

based on no knowledge concerning any project of the Port Authority other or greater than public knowledge, and, indeed, in every instance, dated from times after plaintiff had left office. He also knew that "link" between the real estate ownerships in questions and any Port Authority project was simple geographical location. Of this whole truth of the matter, he chose to say nothing.

The District Court held (1) that nothing in the broadcast charges plaintiff by name with impropriety (2) nevertheless, the language used could be fairly and reasonably construed, as plaintiff alleged in the innuendoes he pleaded, as charging him with acquiring real estate through knowledge gained in public office (3) that though Kellman knew better, knowing the whole truth, the half-truths he uttered were merely "erroneous", and erroneous statement of fact is inevitable in free debate, citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S. Ct. 2997, 41 L. Ed. 2d 789.

The Court of Appeals used different reasoning to reach the same result. It held, construing decisions of Pennsylvania Courts, that the content of the broadcast was not defamatory to begin with. But even if it were, the Court continued, plaintiff 's case failed for lack of proof defendants acted with knowledge of the falsity or reckless disregard of the truth or falsity of their statements, the "malice" necessary for defamation of a public figure to be actionable under *New York Times v. Sullivan*. Further, to the Court's view, some of the statements, as well as the title of the program would be understood by a reasonable television viewer as only rhetorical hyperbole, not intended as statements of fact.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it concerns application of the constitutional standard announced by this Court in *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) for actionability of alleged defamation of a public figure to the medium of a television broadcast, and the powerful coupling therein of words, both spoken and written, with images. Whether such a doubled appeal to the senses of the viewer should require a more searching analysis of the content of the utterance, to determine its actionability, is a question not dealt with by the decisions of this Court.

The decision below should be reviewed also because it raises the question whether the knowledge of falsity or reckless disregard of truth or falsity, of which defendant must be guilty, under *New York Times v. Sullivan*, for actionability of the utterance, should relate not merely to the text of the utterance but also to its context and innuendoes.

ARGUMENT

Plaintiff submits the Court of Appeals erred by deciding, in a way in conflict with applicable state (Pennsylvania) law, that the defendants' utterances

I. Were not defamatory to begin with.

II. Amounted to mere hyperbole, not intended, nor reasonably understood to be intended, as statements of fact.

Plaintiff further submits the Court of Appeals erred by deciding a federal question in a way in conflict with applicable decisions of this Court in that:

III. It held plaintiff 's proof fell short of showing that defendants made their utterance with malice, within the meaning of *New York Times v. Sullivan, supra*, i.e., with knowledge of its falsity or reckless disregard of its truth or falsity.

I.

The Court of Appeals, plaintiff submits, misapplied Pennsylvania law in concluding the content of defendants' broadcast not to have been defamatory to begin with. The Court reached this conclusion principally by assimilating this case strictly to *Redding v. Carlton*, 223 Pa. Super. 136, 296 A 2d 880 (1972). That case concerned a statement made during a campaign publicly mounted by defendants over a proposal that a certain parcel of land, owned by a township supervisor, be bought as the site of a township building. The defendant, opposing such a purchase, published a statement that the supervisor-landowner was guilty of "a conflict of interest and perhaps much more." The Superior Court of Pennsylvania, quoting *New York Times v. Sullivan* for its espousal of "uninhibited, robust, and wide open debate" on public matters, held the defend-

ant's statements only "the type of rhetorical hyperbole common to American politics" and shielded by the First Amendment. The lower Court's denial of recovery was affirmed.

The Court of Appeals concluded that a Pennsylvania Court would reach the same conclusion concerning the content of the broadcast in the present case, that in toto it amounted to no more than an implication of a conflict of interest, and that this, per *Redding v. Carlton*, was non-defamatory.

Plaintiff submits a conclusion that the entire effect of defendants' broadcast was to charge plaintiff with but a conflict of interest requires one to ignore the context of the program. Indeed, the opinion of the Court of Appeals scarcely refers to context, and seemingly contents itself with examination of the mere text of defendants' various statements. But it is the law of Pennsylvania that a determination whether words import a defamatory meaning depends on context as well as text, not merely on text.

Corabi v. Curtis Pub. Co., 441 Pa. 432, 444, 273 A 2d 899

Restatement of Torts, Section 563, Comment d

Textual statements themselves strict and literal truth can be rendered defamatory by the context in which they are framed.

Diamond v. Krasnow, 136 Pa. Super. 68, 7 A 2d 65

Friday v. Official Detective Stories, Inc. (D.C. Pa.) 233 F. Supp. 1021

Both Courts below viewed a video tape replay of the program. The District Court concluded it was indeed defamatory, so much so that it found the Motion for Summary Judgment to prevail "but only by a scintilla". The Court of Appeals, plaintiff submits, lost sight of the critical consideration of context. What

must be reckoned with under that heading are the title of the program, "Public Bridges and Private Riches", and the contrast suggested by these words between honorable public service and private rapacity, the appeal of the words to the ear, half alliteration and half rhyme, the use of the title not only by spoken word of the announcer, but by incorporation in the "art work" used as a display to hold attention at points of station break or commercial advertising, the number of times of this display (at least five), the length of time of the display (4, 7, or 8 seconds), the sharply contrasting imagery used to emphasize the contrast expressed in the title, payment of bridge tolls or passenger fares by the public with opportunities or temptations suggested by the broadcast for those in official authority over operation of the bridges to profit thereby, and closeup shots of expensive cigars being smoked at Port Authority meetings. Underscoring all these contrasts of upright public service with private greed, the individual defendant Kellman, creator and narrator of the program, in the concluding paragraph of his running commentary returned to the title of the program and directly contrasted the phrase "Public Bridges and Private Riches" with "Public Bridges and Public Concern", as a description of a change highly to be desired in "the system of operations on the Port Authority."

In addition, to be counted under the head of context are Exhibit K-17 and Exhibit K-18, each an advance publication by defendants describing the nature and content of the forthcoming special program. Exhibit K-17 was the sales sheet used by defendant to canvass its customers for advertising on the program, in which its content was described as telling "how through neoptism and informed land speculation, the Delaware River Port Authority seems to be run more for *private* enrichment than public interest . . . while JOE PUBLIC PAYS for it all through SUPER-TOLLS" (emphasis in original). Exhibit K-18 consisted of an-

nouncements of the program broadcast by defendants each of the four days preceding it, five times in all, characterizing it as "shocking", and as raising the question "whether or not the Public Bridges were being run for private enrichment."

Of none of these particulars did the Court of Appeals see fit to make anything, in reaching its conclusion. All of them, plaintiff submits, heighten the overall accusation of the program, the gravamen of the Complaint, that plaintiff used insider knowledge acquired in his official capacity for his private pecuniary advantage.

II.

Plaintiff submits the Court of Appeals failed altogether to take into account facts glaringly at odds between the present case and *Redding v. Carlton*. The statement sued on in *Redding* was made in the heat of a public campaign. The broadcast here sued on was proclaimed by the defendants, over and over, to be a presentation of bed-rock fact established by long investigation, its authenticity assured by visual displays of minutes of meetings of Port Authority Commissioners, books of records of deeds of land purchases being withdrawn from racks in public record offices, and being opened at an assertedly damning page for the television viewer's own reading, and the like.

Kellman at deposition (Kellman A12) said the broadcast was a "news program . . . revealing new information to the public. . . ." Later in the same deposition (Kellman A84) he said:

> "Incidentally, I might add to that that propriety is something for the public to judge once they have facts, and my purpose in the entire program was to bring facts forward."

Anchorman Larry Kane, introducing the program, (Complaint par. 15) said:

". . . . for 90 days, Action News reporter, Richard Kellman has travelled the bridges of the Delaware River Port Authority, etc.".

Plaintiff 's interrogatory No. 18 read:

"Give the date when defendant Kellman or any other employee of defendant Capital Cities Communications, Inc. began investigation of the matters portrayed in the program broadcast as aforesaid."

Defendant's answer was:

"18. Early 1972."

Kellman participated in preparation of defendants' Answers to Interrogatories (Kellman, A77). Anchorman Kane's introduction of the program included the statement:

"Kellman's crossing brought us some incredible findings that go right into your pockets."

Webster's 3rd International Dictionary defines the word "findings," in the sense used in this statement of Kane's as follows:

"findings n. — 3b the result or conclusion of any inquiry or investigation."

In March, 1974 a viewer of the program wrote to the station (Exhibit K-15) and referred to it as a "documentary". McCurdy, General Manager of Station WPVI-TV replied (Exhibit K-16), and agreed with that description of the broadcast. Webster (3rd International) supplies this definition of the term:

"Documentary: Having or claiming the objective quality, authority, or force of documentation in the representation of a scene, place or condition of life or of a social or political problem or cause: FACTUAL, OBJECTIVE, REPRESENTATIONAL — used of works of literature, the theater, art, photography, radio and T. V. programs."

Even in their pleadings in this very action, as the opinion of the District Court points out, defendants, in their answer to the Complaint have asserted:

"The broadcast was fairly made and presented in a proper manner after careful investigation and consisted of *true facts* (emphasis the Court's) in a matter of public interest," etc.

The effect of these descriptions of the program, coming from defendants' own mouths, is, plaintiff submits, to preclude any contention that its insinuations and implications as to plaintiff were mere editorial hyperbole, epithetical in character, or simple opinion. On the contrary, the program was, avowedly, a structure of long-investigated and purportedly authenticated fact, with supposedly circumstantial corroboration found by Kellman's following trails through minutes of meetings of Port Authority Commissioners and recordings of deeds in public record offices, camera shots of these documents taken meanwhile and offered for viewing on the television screen. Plaintiff submits that a report so composed and so delivered cannot be dismissed as not at all to be meant or understood as a statement of fact, nor now excused as a mere excess of vehemence, within the free speech guaranteed by the First Amendment. In the light of defendants' own characterizations of the program and their account of its long genesis, it cannot possibly be said, in the words of this Court in *Greenbelt Coop. Pub. Asso. v. Bresler*, 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537, that "even the most careless (viewer) must have perceived that the (statements were) no more than rhetorical hyperbole, a vigorous epithet."

The Court of Appeals, however, so read this record, and cited *Greenbelt* for its conclusion, thereby, plaintiff submits, falling into error.

III.

Plaintiff submits the Court of Appeals erred in holding plaintiff 's proof fell short of showing that defendants made their utterance with malice.

The record shows with indisputable clarity that defendant Kellman began preparation of this program with the preconception that plaintiff had turned knowledge to which he was privy in public office to his private profit. At deposition he identified Exhibit K-5 as his introductory proposal to his Chief, Kampmann, setting forth his original concept of the program. In it he referred to "temptations for Commissioners and others to profit personally", and in a subsequent memo (Exhibit K-6) asserted "guys like Pierce and Cornell are making huge profits through special knowledge and influence that comes with D.R.P.A. (Delaware River Port Authority) appointments." In a third report to his Chief (Exhibit K-8) he said, "I think Pierce would be excellent as a former D.P.R.A. Commissioner who's making hay as a result of contacts and knowledge gained as a Commissioner."

Further, Exhibit K-17, identified by Kellman as "a sales sheet for the selling of commercial time within this program in question", and distributed to prospective advertisers, not only prominently displayed the title of the program but expounded it in terms of "informed land speculation" and "*private* enrichment" (emphasis in the original) at public expense.

The broadcast named plaintiff as holding a partial ownership interest in three specifically identified properties, the 90-acre tract on Route 322, the 5¼ acres in Woodbury, and the small parcel at the Ferry Avenue Station of the Hi-Speed Line. As to every one of these three, plaintiff submits, the defendant Kellman conceded that by air time of his broadcast he had no foundation in fact or otherwise for the inference his statements invited, that plaintiff had used knowledge to which he was privy in his official position for his private profit. Of the three parcels of land, plaintiff 's interest in which Kellman held up before his television audience for arraignment, he was forced at deposition to concede that in each one plaintiff 's first acquisition of any interest was at a date subsequent to his leaving office as a Commissioner of the Authority (Kellman A pages 41-42, 43, 45, 51-52) and based on no knowledge concerning any project of the Port Authority other or greater than public knowledge.

Kellman at deposition (Kellman A pages 63-64) conceded his preconception of Pierce's wrong doing, but the effect of his discoveries it was without factual basis brought him only to refrain from an explicit accusation. He testified thus:

> "Q. Did you believe in the course of your preparation that it was possible that Mr. Pierce had taken advantage of inside information coming to him as a commissioner of the Authority?
>
> A. Yes, I thought it was possible during the course of the preparation of the program.
>
> Q. And did you likewise in his case come to the conclusion that this hypothesis could not be supported?
>
> A. I came to the conclusion that I didn't have the facts to support a public statement to that effect so I did not make the statement."

The Court of Appeals contented itself with accepting this self-serving disclaimer as an exoneration of defendants having "entertained serious doubts as to the truth of any remark in the broadcast." This reasoning disregards the total context, content, and impact of the program, title and all. *St. Amant v. Thompson*, 390

U.S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262, the decision of this Court which first explicated the phrase "knowledge of its falsity or reckless disregard of its truth or falsity" in terms of "entertaining serious doubt of the truth" of the defamatory utterance, did not do so with reference to "any remark in the broadcast;" this Court's words were "entertain serious doubts as to the truth of *its publication*" (emphasis supplied). The "publication" here in suit is not "any remark" taken singly and out of context, it is the broadcast entire as heard and viewed by the television audience.

Failure to state a negative when it would off-set the damaging implication of a positive already uttered, the Court of Appeals reasons, does not constitute the "actual malice" of *New York Times v. Sullivan*. This, plaintiff submits, is to accept the proposition that a half-truth is never a lie. The time honored oath required of any witness in Court is itself witness to the contrary. Defendants knew the whole truth, but chose to tell it selectively, and for this broadcast wove a tissue of half-truth and innuendo. Their knowledge of the whole truth is itself knowledge of the falsity of their uttered half-truths, and reckless disregard of the truth or falsity of their publication.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Henry Thomas Dolan
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 1978 three copies of the Petition for Writ of Certiorari were served by Hand Delivery on Gregory M. Harvey, Esquire, 2100 Fidelity Building, Philadelphia, Pa. 19109 and Elihu A. Greenhouse, Esquire, 2500 Two Girard Plaza, Philadelphia, Pa. 19102, Counsel for Respondents. I further certify that all parties required to be served have been served.

Henry Thomas Dolan
Counsel for Petitioner

1424 Walnut Street
Philadelphia, Pa. 19102

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 74-1248

ALFRED R. PIERCE
v.
CAPITAL CITIES COMMUNICATIONS, INC.
and
RICHARD KELLMAN

HIGGINBOTHAM, A. L., *J.* February 7, 1977

OPINION AND ORDER

Alfred R. Pierce, formerly a Commissioner of the Delaware River Authority and the Mayor of Camden, New Jersey, has brought this diversity action against defendants Capital Cities Communications, Inc., owner and operator of television broadcasting station WPVI-TV, and Richard Kellman, a television reporter employed by WPVI-TV, for an alleged defamation which occurred on November 20, 1973 when WPVI-TV televised a special program entitled "Public Bridges and Private Riches".

Plaintiff seeks a total of four million dollars in damages, including two million for punitive damages.

Defendants have filed a motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The parties have submitted affidavits, briefs, a transcript of the program, a videotape of the program which was shown at oral argument and several depositions. For the reasons stated herein, the defendants' motion for Summary Judgment is granted.

In granting defendants' motion, I recognize that Alfred R. Pierce may feel that careful and accurate reporting could have given him a better and more favorable image. I also know that with the extraordinary powers of the media, their occasional failure to pursue the highest standard of accuracy has caused many honorable and responsible persons to decline any options to serve in public office because they are not willing to have their honest efforts vilified by omissions, excesses or distortions. But, this issue has been answered by the United States Supreme Court's holding that as a matter of Constitutional law a public official may not recover

> . . . damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *New York Times v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 726 (1964).

By this Constitutional standard, the defendants, as to their comments on Pierce, win — but merely by a scintilla. I hope that the media will never believe that a Constitutional right which precludes them from liability is a professional justification for sloppy reporting.[1] Obviously, I am aware of the problem of compressing complex factual data in a flashy television news setting. But hopefully, because of its instant and extraordinary impact with its abbreviated form, reporters should pursue an even higher level of responsibility. The defendant station's slogan "ACTION NEWS" should not become a synonym for "*partially inaccurate news.*" The public deserves a better standard with or without the station's Constitutional immunity.

[1] An example of sloppy and misleading reporting is the failure to disclose that Pierce had purchased the land in question *after* he left public office and not before. It was also not disclosed that when Pierce purchased the land, it was public knowledge that the bridge would be built.

I.

Mr. Pierce was appointed a commissioner of the Delaware River Port Authority by the Governor of New Jersey and served from June 4, 1962 until May 11, 1970; from 1969 until May 11, 1970 he served as Chairman of the Authority [Plaintiff 's Complaint ¶12]. Plaintiff asserts that prior to the defendants' broadcast he ". . . was a person of good name, credit and reputation, both personally and professionally, and deservedly enjoyed the esteem and good opinion of his friends, acquaintances, business and professional associates, professional clients." He further alleges that he ". . . deservedly enjoyed the reputation of being honest, competent, upright and responsible. . . ." [Complaint ¶9]

In approximately mid-August of 1973 defendant Kellman was authorized by his superior at Capital Cities, Mel Kampman, to prepare and produce a program to explore the activities of the Delaware River Port Authority and the performance of the Chairman, Ralph Cornell; this program was part of a series of news broadcasts on issues of public concern. [Kellman Deposition, pp. 23, 24 and 39]

Fourteen statements made on the WPVI-TV broadcast form the basis of the plaintiff 's defamation action:

> ¶15: "When Washington crossed the Delaware River, it was absolutely free. When Action News reporter, Richard Kellman, crossed the Delaware River, it cost him sixty cents. Washington's crossing brought us a nation. Kellman's crossing brought us some incredible findings that go right into your pockets. For 90 days now, Action News reporter, Richard Kellman has traveled the bridges

of the Delaware River Port Authority and the high speed road to profit. In a minute, Action News presents PUBLIC BRIDGES AND PRIVATE RICHES but hold onto your dollars. After this program you may want to swim across the Delaware River".

[WPVI-TV Transcript (TR.) Larry Kane, p. 1]

¶18: "The first hint of what lay ahead came in August of 1969 when the commissioners were to vote on a contract for the bridge superstructure. The steel lattice work that would support the road way of this largest cantilever highway bridge in the U. S. Bethlehem and U. S. Steel were the only bidders with Bethlehem the low bidder at forty-seven million dollars . . . eight million above the engineers' estimate.

[Kellman (K), TR. p. 3]

"Action News obtained a copy of the Port Authority minutes of September 17, 1969. At that meeting, a motion was made to readvertise for new bids. Voting no, were Pa. commissioners Smith, Marsh and Crisconi. New Jersey commissioners voting no included Chairman Alfred R. Pierce and the present chairman Ralph Cornell."

[K. TR. p. 5]

¶20: "Bethlehem's bid was accepted and in 1969 construction began . . . Soon a fifty million dollar bridge had grown to one costing one hundred twenty million — a cost difference equivalent to 120 million bridge tolls at 60 cents each. And so . . . as the toll-payers shelled out nickels, dimes and quarters to pay for the project some Port Authority commissioners saw an opportunity for enormous profits, profits on land deals made possible by the very bridge motorists would be paying for well in the year 2000."

[K. TR. p. 5]

¶22: "For years . . . corporations have been buying up farmland, jockeying for position . . . waiting for the big land rush. Among the properties with identifiable owners . . . is the 90 acre plot off Route 322 . . . where the expressway linking Route 130 and 295 will be built. The deed is recorded at the Gloucester County Courthouse in Woodbury. It shows the property is owned by Alfred R. Pierce . . . former Mayor of Camden and Port Authority Chairman at the time the Barry bridge was approved."

[K. TR. p. 6]

¶24: "While the bridges are beautiful, they also represent a threat to the environment that mass transit doesn't. Bridges encourage auto congestion. Trains promote efficiency which is why the Port Authority is especially proud of the Lindenwold Hi Speed Line. Fully automated, the Hi Speed Line pays for its operating costs through its fares. What it doesn't pay for is the ninety-three million it costs to build. That comes from motorists using the bridges . . .

* * *

"This is the Ferry Ave. station of the Lindenwold Hi Speed line. The ground on which I am now standing is prime commercial property. In a few years there will probably be a high rise office building here. The land is owned by a combine called ABJ, Inc. Shareholders include former Camden mayor and Port Authority Chairman Alfred R. Pierce."

[TR. K. p. 7, 8]

¶26: "Because of the enormous debt the Port Authority owes . . . most commissioners have vowed never again to pay for mass transit through bridge tolls. Money must come from Washington and from the two states. An expansion must come

slowly . . . to the Moorestown Mall . . . the Jersey Shore . . . and to Glassboro . . . by way of Woodbury. But not all three directions at once. There must be priorities.

"A Port Authority study recommended the Gloucester route to Woodbury where there are five acres of land owned by a corporation that includes as shareholders former Camden mayor and Port Authority Chairman Alfred Pierce and former Port Authority Commissioner John Crisconi of Phila. . . .

"In Mid-October, Port Authority engineers confirmed their recommendation that the Woodbury station would be built here, adjacent to the property owned in part by Pierce, Crisconi and Cornell."

[TR. K. p. 9]

¶28: "I think that in this kind of position where you are obviously involved completely with the public's trust you have to go out of your way to prove your honesty by all of your actions. You cannot appear to be doing something dishonest even if you yourself feel that what you are doing is honest. I certainly would say that buying land raises doubts."

[TR., Interviewee John Bunting, p. 10]

¶30: "On October 12, director of bridges for the Port Authority, Andrew Ferenz, was fined and given a suspended jail sentence for using Port Authority building materials on his own home.

[K., TR. p. 10]

"And Andrew Ferenz is the brother-in-law of former Camden mayor and Port Authority Chairman, Alfred R. Pierce. Is it possible that people with such inter-locking interests can truly act in the public interest?"

[K., TR. p. 11]

¶33: "Is it necessary to have men of such enormous power and prestige to serve as commissioners when they get involved in projects which link them with Port Authority projects and make them look bad if the public is told about them?"

[TR., K., p. 11]

¶35: "By July first of next year, Gov.-elect Brendan Byrne of the state of N.J. will have six new appointments to the Delaware River Port Authority and Action News will be watching them closely and tonight we have a question. Will the background of the appointees be thoroughly checked out to avoid any possible future conflict of interest?

"Now before you take that swim across the Delaware River keep this in mind. The system of operations on the Port Authority can and might be changed. 'Public Bridges and Private Riches' can be changed to 'Public Bridges and Public Concern' if indeed the public is concerned about the operations of the Port Authority."

[TR., Larry Kane, p. 12]

II.

Plaintiff contends that these statements are defamatory and therefore actionable under Pennsylvania law. Mr. Pierce alleges that the broadcast was replete with innuendos that he use public office for personal gain. Defendants deny that the broadcast accused the plaintiff of acting in his own selfish interest and in abuse of his public trust as the holder of his office. It is contended by the defendants that ". . . the broadcast was fairly made and presented in a proper manner after careful investigation and consisted of *true facts* in a matter of public interest and general concern relating to certain transactions, some of which involved the plaintiff." Urging that summary judgment is appropri-

ate in this case, the defendants argue that even if the innuendos are warranted under state law, the First and Fourteenth Amendments to the federal Constitution preclude plaintiff, admittedly a public figure, from maintaining this libel action unless actual malice on the part of the defendants can be shown. *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964).

In the *New York Times v. Sullivan* decision, *supra*, the Supreme Court held that the national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open requires:

> ". . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not"

New York Times v. Sullivan, supra; See also *Curtis Publishing v. Butts*, 388 U.S. 130, 87 S.Ct. 1975 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789.

What Mr. Pierce must prove, therefore, is not that certain statements made by the defendant were false, but that the defendants made the statements with a "high degree of awareness of their probable falsity." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed. 2d 262 (1968); *Accord, Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85, 88 S.Ct. 197, 199-200, 19 L.Ed. 2d 248 (1967); *Garrison v. Louisiana*, 379 U.S. 64, 75-76, 85 S.Ct. 209, 212, 216-217, 13 L.Ed. 2d 125 (1964).

But, no federal constitutional principle has been established determining which factors the trial court can consider in deciding whether the plaintiff has met his burden of proof. It is the state law which determines whether this court should look at just the transcript of the program or whether this court should consider not only what the communication states but what it suggests.

Under Pennsylvania law, a communication is defamatory if ". . . it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Cosgrove Studio & Camera Shop, Inc. v. Pane*, 408 Pa. 314, 318, 182 A.2d 751, 753 (1962). See also, *Fram v. Yellow Cab Company of Pittsburgh*, 380 F.Supp. 1314, 1326 (W.D.Pa. 1974). Innuendos may be used to explain in what manner the communication is defamatory. But, the innuendos must be warranted, justified and supported by the communication. Innuendos cannot be "used to introduce new matter, or to enlarge the natural meaning of the words, and thereby give to the language a construction which it will not bear." *Sellers v. Time, Inc.*, 423 F.2d 887, 890 (3rd Cir. 1970).

It is the function of this court to determine whether the language used in the broadcast could be fairly and reasonably construed to have the meaning imputed in the innuendos. *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899 (1971); *Sarkees v. Warner-West Corporation*, 349 Pa. 365, 367, 37 A.2d 544, 546 (1944).

All parties admit that the focus of the broadcast was Ralph Cornell, Chairman of the Delaware River Port Authority when the program was aired in November of 1973. But, the plaintiff argues that the defendants threw him (Pierce) ". . . to the meat grinder for good measure" by implying that he acted dishonestly and that he used his public office for private enrichment while he was a Commissioner and Chairman of the Authority. [Pierce, Deposition B, p. 146]

Plaintiff contends that they accused him of impropriety and dereliction of his duty because while Chairman of the Authority he voted not to readvertise for

new bids on construction of the Commodore Barry Bridge. The following sentence was found particularly offensive: "New Jersey commissioners voting no included Chairman Alfred R. Pierce and the present Chairman Alfred R. Pierce." This statement allegedly singles out Pierce (and Cornell). But nothing in the broadcast charges Pierce with impropriety. Pierce is not specifically named as one of the Port Authority Commissioners who saw an opportunity for enormous profits, profits on land deals made possible by the very bridge motorists would be paying for, well in the year 2000 [Complaint ¶20]. Considering the nature of the audience reached by the broadcast (a necessary consideration under Pennsylvania law), *Boyer v. Pitt Pub. Co.*, 324 Pa. 154, 188 A.203 (1936), it appears that a reasonable inference would be that some of the commissioners may have profited by the vote; the innuendo that Pierce was singled out is not warranted.

It is ironic that at the time of this meeting (September 17, 1969), plaintiff did own an interest in land which he characterized as strategically located to the completed bridge. At the time of the vote, plaintiff had not disclosed this interest to any other Commissioner. [Pierce, Deposition B, pp. 111, 116, 117-118]

The plaintiff also asserts that the innuendo that plaintiff improperly used his public office is warranted by the following statements: "The deed . . . shows the property is owned by Alfred R. Pierce" [¶22]; "The land is owned by a combine called ABJ, Inc. Shareholders include former Camden Mayor and Port Authority Chairman Alfred R. Pierce" [¶24]; and "In Mid-October, Port Authority engineers confirmed their recommendation that the Woodbury station would be built here, adjacent to the property owned in part by Pierce, Crisconi and Cornell" [¶26]. In sum, the defendants' broadcast reported that the plaintiff was a Commissioner of the Delaware Port Authority and was at least partial owner of land which was "strategically located"

near certain Port Authority projects such as the Lindenwold High Speed Line. Although nothing in the broadcast specifically states when the plaintiff acquired these land interests, plaintiff correctly argues that under Pennsylvania law, the language in the broadcast can be fairly and reasonably construed to have the meaning imputed in the innuendos — namely, that the plaintiff obtained these interests by virtue of his public position. *Corabi v. Curtis Publishing Co., supra.*

There is a difference between what the defendants knew about Pierce's land transactions and what was stated or implied in the broadcast. It is argued by the plaintiff that proof of this disparity constitutes proof of actual malice, rendering the constitutional protection afforded putative defendants by the *New York Times v. Sullivan* decision inapplicable to the defendants in this case. In support of this contention plaintiff cites Kellman's testimony at oral deposition. When questioned about the plaintiff 's purchase of land in the location of the Barry Bridge, Kellman said he was aware that ". . . the Bridge was public knowledge prior to the purchase of that property as reflected in the deeds that I discovered." [Kellman, pp. 41-43]. Kellman indicated that he was also aware that "Mr. Pierce's acquisition . . . was in 1971, . . . it was after the construction of the bridge had begun." It is uncontested by the defendants that Pierce left public office in 1970; Kellman was aware that Pierce left public office in 1970 when the broadcast was made. [Kellman 43, 45]. In response to inquiries as to plaintiff 's interest in land at the Ferry Avenue Station of the High Speed Line, Kellman conceded that he was aware at the time of the program that the plaintiff did not obtain this interest until after he had left public office. [Kellman, p. 53].

It is true that the program failed to reveal when Mr. Pierce purchased land situated strategically near various Port Authority projects. Such omissions render

certain statements erroneous. But, as the Court said in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974), "although the erroneous statement of fact is not worthy of Constitutional protection, it is nevertheless inevitable in free debate."

Plaintiff brings to this court's attention two additional statements which are allegedly defamatory. One such statement concerns Mr. Pierce's relationship to Andrew Ferenz. In October, 1973 Ferenz was fined and given a suspended jail sentence for using Port Authority building materials on his own home. During the November, 1973 broadcast, defendants referred to Ferenz as the plaintiff 's brother-in-law. Ferenz is actually married to Mr. Pierce's wife's cousin. [Pierce, Dept. B, 95, 97]. While defendants admit to this error, plaintiff has produced no evidence to show that this misstatement was made with malice. Factual inaccuracies such as this are constitutionally protected unless plaintiff demonstrates that the defendants were aware of the likelihood that they were disseminating false information. *St. Amant v. Thompson, supra*, 390 U.S. at 727, 88 S.Ct. at 1325.

The final statement challenged by the plaintiff is John Bunting's reply to a question posed by Kellman:

> "I think that in this kind of position where you are obviously involved completely with the public's trust you have to go out of your way to prove your honesty by all your actions. You cannot appear to be doing something dishonest even if you yourself feel that what you are doing is honest. I certainly would say that buying land raises doubts."

In his deposition, Pierce described Bunting's statement as "immoral" [Pierce, Deposition B, p. 144]. However, his opinion is clearly protected by the First and Fourteenth Amendments, as the Court ruled in *Gertz v. Robert Welch, supra:*

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." 418 U.S. at 339-340.

It is likely that the program "Public Bridges and Private Riches" may have caused some annoyance and embarrassment to Mr. Pierce; Mr. Pierce's reputation may have been damaged by the broadcast, although no evidence of such injury appears in the record. Some of the remarks may even be characterized as "vehement," "caustic" or "unpleasantly sharp." But showing that a remark is vehement or is a "vigorous epithet" is not enough when, as here, the plaintiff is a public official; factual error, defamatory content and even resort to exaggeration and vilification are essential to free public discussion. *New York Times v. Sullivan, supra*, 376 U.S. at 272, 84 S.Ct. at 721; *Greenbelt Publishing Ass'n v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed. 2d 6 (1970).

A showing of malice may not be presumed but is a matter for proof by the plaintiff. *Time Inc. v. McLaney*, 406 F.2d 565, 572 (5th Cir. 1969). See also *Fram v. Yellow Cab Co. of Pittsburgh*, 380 F.Supp. 1314, 1335 (W.D.Pa. 1974). In the instant case plaintiff has failed to demonstrate that, on the basis of pretrial affidavits, depositions, and documentary evidence, defendants acted with actual malice, the standard required by the Constitution. Plaintiff 's bare allegation of malice is not sufficient to withstand a Motion for Summary Judgment. Therefore, defendants' Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure is GRANTED.

BY THE COURT:

A. LEON HIGGINBOTHAM, *J.*

ORDER

AND NOW, this 7th day of February, 1977, upon consideration of pretrial affidavits, depositions, documentary evidence and oral argument, it is hereby ORDERED that defendants' Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is GRANTED.

BY THE COURT:

A. LEON HIGGINBOTHAM, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1470

ALFRED R. PIERCE, *Appellant*,

v.

CAPITAL CITIES COMMUNICATIONS, INC.
and RICHARD KELLMAN

Appeal from the United States District Court for the
Eastern District of Pennsylvania
No. 74-1248

Argued January 13, 1978

Before: ADAMS, WEIS, *Circuit Judges*
and COOLAHAN, *District Judge.**

HENRY THOMAS DOLAN
Criden, Johanson, Dolan,
Morrissey & Cook
1424 Walnut Street
Philadelphia, PA 19102
Attorneys for Appellant

GREGORY M. HARVEY
Morgan, Lewis & Bockius
123 South Broad Street
Philadelphia, PA 19107

ELIHU A. GREENHOUSE
1900 Two Girard Plaza
Philadelphia, PA 19102
Attorneys for Appellees

* Honorable James A. Coolahan, U.S. District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

(Filed April 12, 1978)

ADAMS, *Circuit Judge.*

We are presented here with a clash between two basic norms in our legal system. One concerns the valued right of a person to be protected against inaccurate statements harming his reputation. The other deals with one of the most indispensable freedoms in a democratic state, namely, that of untrammeled expression regarding the conduct of a public official. Although the reconciliation of these principles in the context of a particular factual configuration seldom will be easy, it is essential to the healthy survival of each. That is the task which this Court is now called upon to perform.

The plaintiff 's objection to the publication he challenges — a television broadcast — is that it gave rise to innuendoes which are defamatory of him. Specifically, Alfred R. Pierce claims that a broadcast by Capital Cities Communications, Inc., owner and operator of a Philadelphia television station, WPVI-TV, and Richard Kellman, a reporter for the station, defamed him by creating the false impression that he had misused his public position in seeking private pecuniary gain. In response, the defendants urge that the First Amendment analysis in the landmark case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and in succeeding decisions, which protect speech about public officials absent a showing of "actual malice," bars recovery in the present situation.[1]

[1] The parties did not address the question whether the applicable state law of defamation gives rise to a tort. Since that issue is of importance in a full analysis of this case, it is considered in part C of the opinion.

A.

Pierce was the Mayor of Camden, New Jersey, for a ten-year period ending in 1969, and a Commissioner of the Delaware River Port Authority from June 4, 1962, until May 11, 1970. From January 1, 1969, until May 11, 1970, he was Chairman of the Authority.[2]

On November 30, 1973, more than three years after Pierce was last a member of the Port Authority, WPVI-TV televised a program, entitled "Public Bridges and Private Riches," which explored the activities of the Port Authority and, in particular, the performance of Ralph Cornell, then its Chairman.[3] During the broadcast, Pierce was named approximately five times in his capacity as former Camden Mayor and Port Authority Chairman.

Since Pierce's position is that the television program as a whole was defamatory with respect to him, even if no single remark in it was such, it is necessary to set forth in some detail its major aspects. The introduction included a statement that, while preparing for the broadcast, "Action News reporter, Richard Kellman" travelled "the bridges of the Delaware River Port Authority and the high speed road to profit" for ninety days.[4] The structure of the Port Authority, the

[2] The Delaware River Port Authority, a bi-state agency involving Pennsylvania and New Jersey, has a total of eight commissioners representing each of the two participating states. See 36 Pa. Stat. Ann. §3503, Article II (Purdon's Supp. 1977).

[3] As the district court wrote, the program in question was designed to "explore the activities of the Delaware River Port Authority and the performance of the Chairman, Ralph Cornell; this program was part of a series of news broadcasts on issues of public concern." In his deposition, Pierce stated that he believed that "the principal focus of the broadcast was Ralph Cornell, with Al Pierce to be thrown into the meat grinder for good measure."

[4] The introduction of the broadcast was the following:

When Washington crossed the Delaware River, it was absolutely free. When Action News reporter, Richard Kellman, crossed the Delaware River, it cost him sixty cents. Washing-

cost of its projects and the use of tolls to pay its debts were then described.

Following the introduction, a segment of the telecast dealt with a cost increase for steel lattice work essential to building the superstructure of the Commodore Barry Bridge. A controversy in 1969 among the members of the Port Authority, relating to the desirability of seeking new bids on the contract for steel, was elaborated, and statements by two participants in the dispute, including Ralph Cornell, were juxtaposed. Then Kellman displayed the minutes of a Port Authority meeting held on September 17, 1969, which recorded the votes on a motion for new bids on the steel contract, and he stated that "New Jersey commissioners voting 'no' included Chairman Alfred R. Pierce and the present Chairman Ralph Cornell." At the conclusion of this portion of the program, Kellman narrated:

> And so . . . as the toll-payers shelled out nickels, dimes and quarters to pay for the project — some Port Authority commissioners saw an opportunity for enormous profits, profits on land deals made possible by the very bridge motorists would be paying for well into the year 2000.

After a pause for a commercial announcement, Kellman noted that there was a close relationship between the construction of the Commodore Barry Bridge, which runs from Chester, Pennsylvania to Bridgeport, New Jersey, and the increase in land values in the Bridgeport area. The mayor of Bridgeport

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Note 4—*Continued*

ton's crossing brought us a nation. Kellman's crossing brought us some incredible findings that go right into your pockets. For 90 days now, Action News reporter Richard Kellman has traveled the bridges of the Delaware River Port Authority and the high speed road to profit. In a minute, Action News presents PUBLIC BRIDGES AND PRIVATE RICHES but hold onto your dollars. After this program you may want to swim across the Delaware River.

was quoted as saying that the values of land in the town had risen directly as a result of the construction of the bridge. As to Pierce's own interest in land in the vicinity of the Commodore Barry Bridge, Kellman remarked:

> Among the properties with identifiable owners . . . is this 90-acre plot of Route 322 . . . where the expressway linking Routes 130 and 295 will be built. The deed is recorded at the Gloucester County Courthouse in Woodbury. It shows the property is owned by Alfred R. Pierce . . . former Mayor of Camden and Port Authority Chairman at the time the Barry bridge was approved. On the day Pierce bought his 90 acres . . . he also bought 22 acres more . . . just across the road . . . and on the same day . . . in April of last year . . . he sold the 22 acres to a corporation that also has the deed to 67 acres farther up the road where Route 322 crossed Route 295.

The broadcast proceeded to focus on the development of the Lindenwold Hi-Speed Line, a mass transit facility that was built and is operated under the auspices of the Port Authority and runs from Philadelphia to Lindenwold, New Jersey. Kellman indicated that "(t)here's talk of extending the Hi-Speed Line past Lindenwold to the Jersey Shore" in the event of the continued expansion of the area, residentially and commercially. Certain land near the Ferry Avenue station of the Lindenwold Hi-Speed Line, described as "prime commercial property," was said to be owned by "a combine called ABJ, Inc.," whose shareholders "include former Camden Mayor and Port Authority Chairman Alfred R. Pierce."

Kellman mentioned a third parcel of real estate in which Pierce was portrayed as having an interest, which was said to be located in Woodbury, New Jersey,

near a proposed extension of the Hi-Speed Line. As Kellman said:

> A Port Authority study recommended the Gloucester route to Woodbury where there are five acres of land owned by a corporation that includes as shareholders former Camden Mayor and Port Authority Chairman Alfred Pierce and former Port Authority Commissioner John Crisconi of Philadelphia.
>
> . . .
>
> In mid-October, Port Authority engineers confirmed their recommendation that the Woodbury station would be built here, adjacent to the propoerty (sic) owned in part by Pierce, Crisconi and Cornell.

In the aftermath of those remarks, Kellman questioned Cornell about the "guidelines" he followed in his work in order to avoid a conflict of interest, and Cornell replied that he adhered to "the ten commandments." A prominent Philadelphia banker, John Bunting, who has since been appointed to the Port Authority, was quoted as saying that, in his view, "certainly buying land raises doubts."

Kellman then explained that the director of bridges for the Port Authority, Andrew Ferenz, had been fined and given a suspended jail sentence for "using Port Authority building materials on his own home." Ferenz was described as the brother-in-law of "former Camden Mayor and Port Authority Chairman, Alfred R. Pierce."

On May 16, 1974, five-and-one-half months after the airing of the broadcast, Pierce filed a complaint, grounded on diversity jurisdiction, charging that the television program falsely "accused plaintiff of acting in his own selfish interest and in abuse of his public trust." Pierce also alleged that harmful "innuendoes"

arising from it subjected him to "public ridicule, contempt, and humiliation," injuring his "good name and reputation" and thereby defaming him. He sought compensatory damages in the amount of two million dollars, as well as punitive damages for the same sum.[5] After the defendants filed an answer, there was extensive pre-trial discovery. On the basis of the information acquired during discovery, the defendants moved for summary judgment.

The district court, in an opinion and order dated February 7, 1977, held that the application of the principles enunciated in *New York Times* required a grant of summary judgment on behalf of the defendants, for Pierce had not set forth sufficient facts showing, as a public official is required to do, that the publication in question, even if defamatory, was made with "knowledge that it was false or with reckless disregard of whether it was false or not."[6]

B.

Pierce urges that the district court erred in not fully considering the harmful innuendoes, or the inferences drawn from context, that necessarily flowed from the language and composition of the television broadcast viewed as a whole.[7] If one takes account of such in-

[5] To receive punitive damages for a tort, it is required, under Pennsylvania law, that a plaintiff establish that the tortious conduct in question was "outrageous." See *McSparran v. Pennsylvania Railroad Co.*, 258 F. Supp. 130, 134 (E.D. Pa. 1966); *Chambers v. Montgomery*, 192 A.2d 355, 358 (Pa. 1963); *Focht v. Rabada*, 268 A.2d 157, 159 (Pa. Super. 1970); *Restatement, Torts* §908(1) (1939). See generally *Medvecz v. Choi*, No. 77-1240 (3d Cir., filed Dec. 22, 1977). Additionally, in a defamation action, the requirements of *New York Times* must of course be met. Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

[6] 376 U.S. at 280.

[7] The term "innuendo" has two possible meanings in the law of defamation, one of which is technical and the other of which is not. The narrow, technical meaning of the term is associated with the common law system of pleading, under which an "innuendo" was

nuendoes, Pierce submits, it can only be concluded that the requirement of a showing of "actual malice" established by *New York Times* does not bar recovery here.

It is maintained by Pierce, for instance, that the discussion in the broadcast of the 1969 vote by members of the Port Authority over rebidding a contract for steel to be used in constructing the Commodore Barry Bridge raised the incorrect implication that Pierce had cast his vote in order to expedite the construction, and thereby accelerate his realization of profits from the resale of land he had acquired near the bridge. Also, Pierce charges that the broadcast impliedly suggested — again, falsely — that he had used knowledge gained as a public official in making his private acquisitions of real estate. Further, Pierce insists that the opinions expressed in the program, such as by John Bunting, to the effect that land purchases by Port Authority Commissioners are improper, and the program's title, "Public Bridges and Private Riches," tended to defame him contextually, although admittedly not literally.[8]

Defendants' knowing or reckless disregard of the falsity of the publication, Pierce suggests, may be inferred from the fact that the broadcast, while it mentioned him in connection with three real estate trans-

Note 7—*Continued*
an explanation of the defamatory meaning of a communication in light of extrinsic circumstances, the existence of which was averred to in a prefatory statement called an "inducement." See *Restatement, Second, Torts*, §563, comment (f) (1977). That is *not* the meaning of the word as employed in this opinion. The second, and here the relevant, meaning of "innuendo" is that which it has in common language, namely, the insinuation or implication which arises from the literal language used in a statement or set of comments.

[8] Pierce also objects to the program's introductory comments which, he claims, provided the impression of official wrongdoing on the part of Port Authority members and, consequently, impugned Pierce's reputation since he had served on the Authority during the relevant period of time.

actions, did not explicitly negative the implication that Pierce had utilized insider information in buying the land in question. He points in particular to Kellman's deposition and to memoranda written by Kellman to his superiors during the preparation of the program which, Pierce claims, demonstrate that the reporter fully recognized that Pierce's purchases occurred *after* he had left office and *after* the public had been told of the Port Authority projects in question — even though, in the broadcast, the time sequence was not made clear.[9]

In response, the defendants press the point that Pierce has not been able to identify any specific statement in the telecast relating to him that is false other than the comment — which defendants claim is immaterial in any event — that he is the brother-in-law of Andrew Ferenz.[10] Defendants note that, in this appeal, Pierce appears to have abandoned the argument that the remark about Pierce's relationship with Ferenz may be construed as having defamed him. Even so, defendants stress, there is no indication in the record that they knew or had reason to know of the falsity of

[9] As Pierce's brief summarizes the point:
The broadcast named plaintiff as holding a partial ownership interest in three specifically identified properties, the 90-acre tract on Route 322, the 5¼ acres in Woodbury, and the small parcel at the Ferry Avenue Station of the Hi-Speed Line. As to every one of these three, plaintiff submits, the defendant Kellman conceded that by air time of his broadcast he had no foundation in fact or otherwise for the inference his statement invited, that plaintiff had used knowledge to which he was privy in his official position for his private profit.
Thus, Pierce submits, the defendants knew of the falsity of the innuendoes arising from the utterances made in the television broadcast, or at the least acted in reckless disregard of their falsity.

[10] It appears from the record that Pierce and Ferenz are married to cousins instead of to siblings.

their indentification of Ferenz as Pierce's brother-in-law.[11]

Further, the defendants contend that the various, allegedly harmful "innuendoes" ascribed to the broadcast are incapable, under *New York Times* and succeeding decisions, of giving rise to actionable defamation. With respect to the program's title and its introduction, which purportedly paint a picture of less-than-scrupulous activity by members of the Port Authority, the defendants maintain that such language should be perceived as the kind of hyperbole or colorful phraseology that is protected by the First Amendment. And as to the observation by Bunting that in his view purchases of land by Port Authority Commissioners are questionable, defendants suggest that such a statement is precisely the sort of opinion about public affairs which should be accorded constitutional protection.

Also, regarding the plaintiff 's contention that defamatory innuendoes arose from the defendants' failure to negative the possibility that Pierce acted improperly by purchasing three parcels of real estate, the defendants emphasize that such a position depends fundamentally on an interpretation of various aspects of the broadcast, not on anything directly said in it. And when the cited innuendoes are taken in turn, it is argued, the constitutional standard cannot be met.

Specifically, as to the supposed "innuendo" arising from the discussion of the vote regarding rebidding of the contract for steel for the Commodore Barry Bridge, defendants argue, first, that nothing was said in the program to the effect that Pierce voted "no" on the rebidding proposal in order to speed up the receipt of profits from the sale of land near the bridge. Moreover, it was stated that Pierce's purchase of real estate near the bridge occurred in "April of last year," which would

[11] The record indicates that reporter Kellman was informed by persons associated with Pierce that Pierce was Ferenz's brother-in-law and that Pierce had been so identified in published sources.

have been in April of *1972*, the year prior to the broadcast. Since the controversy about the rebidding of the steel contract occured in *1969*, defendants argue, it is plainly unreasonable to conclude that the broadcast created the misimpression that Pierce owned the land on the occasion of the crucial vote.

Because the program did include the time sequence of the vote on the steel contract and of Pierce's acquisitions of land near the Commodore Barry Bridge, defendants declare also that it cannot be claimed that the broadcast raised the inaccurate implication that Pierce approved the location of the Commodore Barry Bridge at the time that he owned land near where the bridge ultimately was built. Again because the relevant timing was stated in the broadcast, defendants further contend that it is unreasonable to conclude that it created the false impression that Pierce took advantage of insider information when he initially bought the real estate near the Commodore Barry Bridge.

As to the other two parcels of land in which Pierce had an interest — those near an existing, as well as a proposed, station of the Hi-Speed Line — defendants concede that the program did not provide the time sequence of official action and of Pierce's purchases. Despite that omission, defendants would have us affirm the district court's ruling. For, they stress, Pierce was said to have owned the two plots in question jointly with Ralph Cornell, then the incumbent Chairman of the Port Authority. Since such a revelation is the sort of comment about a public official that should be accorded protection under the First Amendment, and since some compression of facts relating to an item covered in a television broadcast is inevitable, defendants argue that no policy of the First Amendment would be served, and key ones would be undermined, by concluding that the statements about the Ferry Avenue and Woodbury real estate constituted actionable defamation.

Regarding Kellman's deposition and his memoranda to his superiors, defendants insist that they fail to display the existence of any knowing or reckless disregard of falsity — but rather indicate only that the defendants wondered whether to charge the plaintiff with a conflict of interest, and decided ultimately not to do so.[12]

C.

In resolving this dispute, we initially consider the governing tort law in order to ascertain whether, in the present situation, defamation has occurred. For before investigating whether the constitutional principles of *New York Times* operate to bar recovery, it would appear appropriate to ask whether a state tort has arisen in the first place. Moreover, since our jurisdiction over the case is predicated upon the diversity of the citizenship of the parties, under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny, we are admonished to start with the applicable state law.[13]

A threshold question in this regard is which state's law should be utilized. The parties indicated, at oral argument, that the law of Pennsylvania governs. Such a position apparently is bottomed on the fact that the business activities of the television station and the reporter charged with defamation are based in Philadelphia and, as a result, that jurisdiction has an abiding interest in the lawsuit.[14] In the absence of any suggestion that there exists here a true conflict of law — that is, that Pennsylvania law differs from that of another interested forum having a strong competing stake in the case arguably outweighing Pennsylvania's interest — there is no occasion to diverge from the parties' position. This being so, we must decide what resolution a Pennsylvania court would reach with regard to the issues in the present appeal.

[12] As to Pierce's objection to a circular distributed by the television station to potential advertisers, which indicated that the program would make revelations about "nepotism" in the operation of the Port Authority, defendants point out that the use of the word was clearly not in reference to Pierce but rather, as the program indicated, was directed at the activities of Chairman Cornell.

[13] Although a federal diversity court should not develop a wholly independent federal standard with which to determine issues of substantive right, it also should not apply state law in an unduly narrow and mechanical manner. Rather, a federal court should consider carefully the underlying principles and policies embodied in state precedents. See *Medvecz v. Choi*, No. 77-1240, n.14 (3d Cir., filed Dec. 22, 1977). Cf. *Quinones v. United States*, 492 F.2d 1269, 1276-79 (3d Cir. 1974).

Pennsylvania has adopted the definition of defamation incorporated in the *Restatement, Torts* §559 (1938), which provides:

> A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.[15]

In Pennsylvania as well as under the *Restatement*, whether or not language can reasonably be construed as defamatory is a question of law to be determined by a court.[16]

Ascertaining whether a communication is capable of a defamatory meaning depends upon what a recip-

[14] See *Griffith v. United Air Lines, Inc.*, 203 A.2d 796, 805 (Pa. 1964) (". . . the strict lex loci delicti rule should be abandoned in Pennsylvania in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court.") See also *Cipolla v. Shaposka*, 267 A.2d 854, 855-56 (Pa. 1970).

[15] See *Cosgrove Studio and Camera Shop, Inc. v. Pane*, 182 A.2d 751, 753 (Pa. 1962). See also *Corabi v. Curtis Publishing Co.*, 273 A.2d 899, 904 (Pa. 1971). The definition in the *Restatement, Torts* (1939) was carried over intact to the *Restatement, Second, Torts* §559 (1977).

[16] See *Corabi v. Curtis Publishing Co.*, 273 A.2d 899, 904 (Pa. 1971) ("If the court determines that the statement is capable of a defamatory meaning, it is for the jury to determine whether it was

ient "correctly, or mistakenly but reasonably, understands" that the statement was intended to express.[17] It is established that a court should not scrutinize simply the literal references of the language in question, but also should weigh the words "together with their context." *Restatement, Second, Torts* §563, Comment (d). In Pennsylvania, the burden of proving that a statement is defamatory — as well as establishing its publication by the defendant, its application to the plaintiff, and the recipient's understanding of its defamatory meaning — is on the plaintiff.[18]

Under Pennsylvania cases handed down after the Supreme Court decided *New York Times*, the definition of defamatory speech has been held to include consideration of the constitutional principles articulated in that seminal opinion. Thus, even though in analyzing this case we start with Pennsylvania tort law, no rigid line of demarcation may be maintained between state law rules and constitutional norms, for both are intermixed in the Pennsylvania precedents.[19]

In *Redding v. Carlton*,[20] it was concluded that the challenged allegations, which were published during a

Note 16—*Continued*
so understood by the recipient. . . ."). See also *Restatement, Second, Torts* §614 (1977):

(1) The court determines
  (a) whether a communication is capable of bearing a particular meaning, and
  (b) whether that meaning is defamatory.
(2) The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient.

[17] *Restatement, Second, Torts* §563 (1977).

[18] See 12 Pa. Stat. Ann. §1584a. (Purdon's Supp. 1977).

[19] This intermixture in the cases represents a certain lack of analytical clarity, for a defamation decision does involve two separate sorts of inquiries: first, is there an infringement of a state-protected right to be free from a tortious invasion of one's reputation?; and second, even if there is, does the First Amendment nonetheless preclude recovery?

[20] 296 A.2d 880 (Pa. Super. 1972).

campaign to prevent the purchase of a proposed building site for a township headquarters and referred to the town supervisor's dual role as supervisor and landowner, were not libelous. The defendant had complained that the supervisor's position evidenced a "conflict of interest at the very least, and perhaps much more." In analyzing whether such a remark may be said to be defamatory, the Pennsylvania court declared that "(f)ree speech would be endangered if innocuous statements were found capable of possessing a defamatory meaning." It is necessary, the court underscored, to decide whether a defamation has occurred in light of the principles enunciated in *New York Times* — namely, that our country has a "profound commitment" to the notion that debate on public matters should be "uninhibited, robust, and wide-open," and that our nation's political and moral undertaking presupposes that some "unpleasantly sharp attacks on government and public officials must be protected."[21] As the court in *Redding* elaborated:

> To prevent a chilling effect on free speech, the Supreme Court of Pennsylvania has held that 'statements which represent differences of opinion or are annoying or embarrassing, are without more not libelous.' *Bogash v. Elkins*, . . . 176 A.2d 677, 679 (1962). Neither is a statement libelous which is 'no more than rhetorical hyperbole' or 'a vigorous epithet' used to describe what the publisher believes to be another's extremely unreasonable position. *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U. S. 6, 14 . . . (1970).[22]

The *Redding* court, in view of these guiding postulates, determined that the challenged statement that the town supervisor's role evidenced a conflict of inter-

[21] Id. at 881, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

[22] 296 A.2d at 881-82.

est "at the very least, and perhaps much more" was a remark characterized by "the type of rhetorical hyperbole common to American politics," and as such it is protected by the First Amendment.[23] With regard to the only misstatement in the defendant's publication — namely, the assertion that the plaintiff 's property was adjacent to, rather than near, the proposed building site — the *Redding* court noted that it is "minor," and moreover that it is incapable of bearing a defamatory meaning since it is analogous to the "rhetorical hyperbole" or "vigorous epithet" that commonly is heard in American public life.[24]

Additionally, while avowing that the defendant's comments dealt, at least in part, with factors motivating the plaintiff 's actions, *Redding* emphasized that errors of fact about such matters are almost unavoidable. *Redding* embraced the comment in *Sweeney v. Patterson*[25] — which the Supreme Court also quoted with approval in *New York Times* — where it was stated that "(e)rrors of fact, particularly in regard to a man's mental states and processes, are inevitable . . . . Whatever is added to the field of libel is taken from the field of free debate."[26] *Redding* concluded that to hold that the questioned publications were capable of a defamatory meaning would unduly infringe upon "the field of free debate."[27]

On the basis of the analysis in *Redding*, which appears consistent with the precepts articulated by the Pennsylvania Supreme Court in *Bogash v. Elkins*, 176 A.2d 677, 678-79 (Pa. 1962) and *Volomino v. Messenger Publishing Co.*, 189 A.2d 873, 874-75 (Pa.

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[23] Id. at 882. See *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 14 (1970).

[24] 296 A.2d at 882.

[25] 128 F.2d 457 (D.C. Cir. 1942).

[26] Id. at 458, quoted in *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964).

[27] 296 A.2d at 883.

1963), we have concluded that the Pennsylvania courts would hold that the broadcast of concern here, in terms of both the specific statements in it as well as their innuendoes, is incapable of a defamatory meaning.

The only specific error in the program was a comment about Pierce's relationship with Ferenz, which suggested that the two men had a closer family tie than in fact they had — although there was some such connection.[28] That misstatement certainly is a minor matter in the context of the broadcast in its entirety. For the burden of the discussion of the relationship between the two men was that *some* interlocking connections existed among the individuals involved in Port Authority activities, not that any particular relationship obtained.[29]

Further, in response to Pierce's objection to the implications of some of the program's language that may be said to constitute hyperbole — such as the title, and the introductory remarks that the public should "hold onto your dollars" and that the reporter investigating the story pursued the "high speed road to profit" — it should be noted that such language would appear to fall squarely within the reach of the principles elaborated in *Redding*. Moreover, since *Redding* grants protection to the bald assertion of a conflict of interest, it would seem *a fortiori* that the Pennsylvania courts would safeguard the statements about Pierce's land purchases, which are said by plaintiff only to carry the implication of a conflict of interest.[30]

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[28] See note 10 *supra*.

[29] As the defendant has pointed out, Pierce on appeal appears to have dropped the suggestion that the statement about his relationship with Ferenz by itself is defamatory. Yet, because this is not clear from the record, it is necessary to deal with the matter.

[30] Furthermore, given the breadth of the principles in *Redding*, it cannot be concluded that a Pennsylvania court would rule that the opinions expressed in the broadcast, such as by Bunting — to

Thus, under Pennsylvania law no defamation has occurred in the present situation.

D.

But even if we have miscontrued the Pennsylvania law of defamation, the result in this appeal would not be altered. This is so since, even if the publication here were held to be actionable under state law, it nevertheless would be privileged on constitutional grounds.[31]

Discussions by the Supreme Court of the constitutional privilege for defamatory speech about public officials have reflected a keen awareness that this area of the law entails a definite tension between two fundamental ideals, and that an accommodation between them must be struck in each case. On the one hand, our legal system recognizes the principle that an individual should be protected against incorrect statements which dishonor his name.[32] Indeed, "(s)ociety has a pervasive and strong interest in preventing and

Note 30—*Continued*
the effect that land purchases by Port Authority Commissioners are improper — are undeserving of First Amendment protection.

[31] Although, as a general matter, when a case may be disposed of on non-constitutional grounds, it is appropriate not to reach the constitutional issue, such a result in this case would be unduly insensitive to the important First Amendment values at stake here, and seems inconsistent with the approach of the Supreme Court in the area of defamation. Cf. *Siler v. Louisiana & Nashville Ry. Co.*, 213 U.S. 175, 193 (1909). ("When a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons.").

[32] The individual's interest safeguarded by a state's law of defamation is a "relational" one, as it involves the opinion that members of a community have of a person and the impact on that opinion of an utterance by the defendant. See W. Prosser, *Law of Torts*, §111, at p. 737 (4th ed. 1971). Defamation thus cannot occur when a statement is made in private that no third party is ever allowed to hear. Rather, "(a) communication is defamatory if it tends so to

redressing attacks upon reputation." *Rosenblatt v. Baer*, 383 U. S. 75, 86 (1966).[33] On the other hand, our courts must adhere to the notion, expressed in *New York Times* and the cases following it, that free expression about public matters on the part of citizens and the press must be zealously guarded.[34]

The starting point for an attempt to accommodate both of these precepts, of course, is the Supreme Court's elaboration in *New York Times* of the constitu-

harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Restatement, Second, Torts* §559 (1977).

[33] Cf. Shakespeare, *Othello*, III, iii, 155-61 (Iago) (A. Harbage ed., 1969).

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash; 'tis
> something, nothing,
> 'Twas mine, 'tis his, and has been slave to
> thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed.

[34] See *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). See also Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L. Rev. 199 200 (1976) ("*Gertz*, like all of the *New York Times* series of decisions, attempts to reconcile mutually irreconcilable values: the polity's interest in free and full interchange of potentially useful information and ideas, and the citizen's interest in freedom from destructive invasions of his reputation, relationships, and personality."); W. Prosser, *Law of Torts* §111, at 737 (4th ed. 1971) (the law of defamation ". . . is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm. *The explanation is* in part one of historical accident and survival, *in part one of the conflict of opposing ideas of policy in which our traditional notions of freedom of expression have collided violently with sympathy for the victim traduced and indignation at the maligning tongue.*" (emphasis supplied).)

tional framework for defamation analysis. Prior to *New York Times*, the Supreme Court had announced in dicta that libelous words were not safeguarded by the Constitution.[35] The Court's approach was dramatically altered in 1964 by *New York Times* which, in the words of one commentator, "created an entirely new system of liability for defamation."[36]

In reversing a decision by the Alabama courts holding a publisher strictly liable for defamatory falsehoods in an advertisement soliciting funds for the civil rights movement,[37] *New York Times* took as its basic premise

[35] See *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952). See also *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 & n.10 (1961); *Roth v. United States*, 354 U.S. 476, 486-87 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Near v. Minnesota*, 283 U.S. 697, 715 (1931). But see *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (". . . libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."). For a review of the modern development of the American law of defamation, see Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1359.

[36] Anderson, *Libel and Press Self-Censorship*, 53 Tex. L. Rev. 422 (1975). See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 194 (". . . the opinion *(New York Times)* makes a notable shift in constitutional idiom . . ."). Cf. Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 884-90 (1970) (viewing *New York Times* as an uncommon attempt by the Supreme Court to enunciate in the First Amendment area a determinate rule of privilege).

[37] In *New York Times*, the Supreme Court reversed a libel judgment of $500,000 that had been awarded to the police Commissioner of Montgomery, Alabama, against four clergymen and the New York Times. The allegedly defamatory publication was a paid advertisement soliciting contributions for activities by civil rights activists in the South. The advertisement charged the police with brutality and harassment during racial disturbances. The police commissioner was not named in the advertisement, but was only linked to the assertions in it by virtue of his official position as supervisor of the police force.

the central meaning of the First Amendment, which was said to be "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[38] The majority rejected the position, advocated by three concurring Justices,[39] that speech defaming public officials should be accorded absolute immunity.[40] Instead, the Court established for such speech a qualified privilege defeasible only on proof of "actual malice" on the part of a defendant.[41] "Actual malice" is not at all synonymous with common law malice, which

[38] 376 U.S. at 270. See id. at 275 (quoting Madison's statement, "If we advert to the nature of republican government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people."). See also Kalven, *The New York Times Case: A Note On "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 208-09. See generally J. Miller, *Crisis In Freedom: The Alien and Sedition Acts* (1951); Brant, *Seditious Libel: Myth and Reality*, 39 N.Y.U.L. Rev. 1 (1964).

[39] Justices Black, Douglas and Goldberg urged that there should be a rule of absolute immunity for speech defaming public officials. See 376 U.S. at 293 (Black, J., concurring), 297 (Goldberg, J., concurring in result). Justice Douglas joined both concurring opinions.

[40] Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (a rule of absolute immunity "would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.").

[41] A plaintiff must prove "actual malice" with "convincing clarity." See *New York Times Co. v. Sullivan*, 376 U.S. at 285-86 ("(W)e consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands . . ."). See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

includes spite or ill-will.[42] What is meant by the term in the defamation context is either that the defendant knew of the falsity of the communication in question or that he published the comment in reckless disregard of its truth or falsity.[43]

New York Times thus stands, *inter alia*, for the proposition that a calculated lie about a public official, or a statement uttered out of reckless inattention to its falsity, is beyond the pale of constitutional protection. *See Garrison v. Louisiana*, 379 U. S. 64, 75 (1964). In laying down this standard, the Court took pains to guard against too sweeping a definition of actionable defamation. It stressed that, as a general matter, "erroneous statement is inevitable in free debate,"[44] and that speakers or publishers, if exposed broadly to liability for defamation, might well engage in self-censorship. Such self-checking could be expected to follow as much from the threat of a sanction as from

[42] See *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964) ("Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."). See also L. Tribe, *American Constitutional Law* §12-12, at 634-35 n.21 (1978).

[43] See 376 U.S. at 279-80 (a public official is prohibited from recovering damages for a defamatory publication bearing on his official conduct "unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

There can be little doubt that a certain confusion has arisen as a result of the use of the term "actual malice" in referring both to knowing as well as to reckless disregard of falsity. Nevertheless, the use of the term in legal literature and defamation decisions has persisted. Thus, in this opinion, following *New York Times*, the phrase is utilized as a short-hand expression for knowing or reckless inattention to the falsity of a publication.

[44] Id. at 271. See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters.").

the actual enforcement of one,[45] for not only is it frequently difficult to prove the truth of a defamatory communication,[46] but also the risk incurred in attempting to establish truth before fallible juries or judges is considerable.[47] Consequently, *New York Times* determined not to shield speech about public officials merely on a case-by-case basis, but rather to enunciate a general protective principle designed to leave room for courts to guard the individual against malicious attacks on his reputation and, at the same time, to prevent undue "chilling effects" on such expression.[48]

The meaning of the Supreme Court's "actual malice" requirement was amplified in *Garrison v. Louisiana*,[49] where the Court distinguished between an "honest utterance, even if inaccurate," which is to be constitutionally safeguarded, and the "use of calculated falsehood" which is not.[50] The knowing and de-

[45] See L. Tribe, *American Constitutional Law* §12-12, at 634 (1978); Anderson, *Libel and Press Self-Censorship*, 53 Tex. L. Rev. 422, 424-26, 430-34 (1975) (emphasizing the considerable financial cost of defending defamation suits).

[46] Truth, of course, is a defense to a charge of defamation. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489-90 (1975); *Restatement, Second, Torts*, §581A (1977); W. Prosser, *Law of Torts* §116, at 796-99 (4th ed. 1971). See also Keeton, *Defamation and Freedom of the Press*, 54 Tex. L. Rev. 1221, 1241-45 (1976).

[47] See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 212.

[48] Cf. *Dombrowski v. Pfister*, 380 U.S. 479, 489 (1965). See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-44 (1974) (to scrutinize and weigh the competing interests in every libel case "would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. . . . [W]e must lay down broad rules of general application.").

[49] 379 U.S. 64 (1964). In *Garrison*, the Court held that the rule of *New York Times* limits state power to impose criminal sanctions for criticizing the official conduct of public officers.

[50] Id. at 75.

liberate lie about a public official is not accorded First Amendment protection, the Court in *Garrison* indicated, because it is "at odds" with the norms of a democratic polity and with the requisites of "orderly" social, political and economic change.[51] *Garrison* invoked as support for this idea the dictum in *Chaplinsky v. New Hampshire*[52] that certain types of utterances, such as a conscious prevarication about a public official, "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[53]

In the present case, as had been noted, the only falsity identified in the broadcast is a statement regarding Pierce's relationship with Ferenz. However, as to this remark, there is no indication that any calculation or deliberateness on the defendants' part entered into the act of publication. Because there was a basis on which Kellman could have reasonably believed that Pierce was Ferenz' brother-in-law,[54] the comment is most properly

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[51] Id. Cf. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1, 18-19 (1965) "[T]he *New York Times* principle has an important qualification; it does not bar civil or criminal libel actions for false criticism of the official conduct of a public official if that criticism is made with knowledge of its falsity or in reckless disregard of whether it was false or true. The underpinning of that qualification is the 'redeeming social value' test."). See also *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

[52] 315 U.S. 568 (1942), quoted in *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

[53] 315 U.S. at 572.

[54] See note 11 *supra*.

understood as an "honest utterance, even if inaccurate," and therefore as constitutionally protected.

Further, the Supreme Court has made it clear that the "recklessness" component of "actual malice" canot be inferred simply from the failure to act in conformity with the conduct of a prudent or reasonable person. In *New York Times* itself, the Court held that the plaintiff did not satisfy his burden of proof because the record did not demonstrate that the publisher was aware of the likelihood that he was circulating false information. That was the case even though it might have been negligent not to have checked the accuracy of the copy of the advertisement against stories in the newspaper's own files.[55] And in *St. Amant v. Thompson*,[56] the Court emphasized that in order to establish "actual malice," one must show more than negligence:

> . . . reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. *There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.* (emphasis supplied)[57]

Consequently, in determining whether a defendant has been reckless, the operative inquiry is whether he published the statement even though he "in fact entertained serious doubts as to the truth of his publication."[58]

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[55] See 376 U.S. at 287-88 ("We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements . . .").

[56] 390 U.S. 727 (1968).

[57] Id. at 731.

[58] The Supreme Court in *St. Amant* explicitly recognized that the emphasis on a defendant's subjective doubt under the standard

There is no indication in the present record that the defendants "entertained serious doubts" about the truth of any remark in the broadcast. As defendants have pointed out, the Kellman memoranda and the other materials adduced during discovery on which Pierce seeks to rely do *not* demonstrate that they knew that utterances in the broadcast were of questionable validity. To the contrary, these memoranda establish that they considered whether to charge Pierce — and Cornell — with utilizing insider information for private gain, and decided on the basis of the data before them not to do so.[59]

Moreover, the publication of hyperbole, even if caustic and irritating, cannot by itself support the inference that the publisher evidenced "actual malice". In *Greenbelt Cooperative Publishing Assn. v. Bresler*,[60] the plaintiff complained that he had been defamed by statements reported in defendant's newspaper which charged him with "blackmail."[61] Notwithstanding the use of such an inflamatory term, the Supreme Court held that "as a matter of Constitutional law, the reference to 'blackmail' in these circum-

Note 58—*Continued*
of knowing or reckless publication of falsity might be said to encourage publishers not to investigate the accuracy of defamatory statements, but concluded that this was an acceptable side-effect — to the extent it exists — in the context of public debate on public issues. See 390 U.S. at 731-32. For the point that reckless disregard of falsity requires a high degree of subjective awareness of falsity, see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974).

[59] At most, on the facts here, it might be said that the defendants acted carelessly or negligently. But this alone, quite plainly, is not enough. For ". . . the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies." *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968).

[60] 398 U.S. 6 (1970).

[61] Id. at 7-8. In *Greenbelt*, the relevant state law made blackmail a crime.

stances was not slander when spoken, and not libel when reported" in the newspaper. The rationale for this result was that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." The Court refused to permit the imposition of liability on the newspaper in such circumstances because it would "subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments."[62]

It appears that, in the situation under consideration, some of the statements in the program's introduction as well as its title would be construed by a reasonable television viewer as being essentially hyperbole. As such, they must be accorded the full measure of constitutional protection mandated by *Greenbelt*.[63]

The further claim by Pierce is that "actual malice" may be inferred from the fact that the defendants published remarks giving the impression, without saying so explicitly, that he was engaged in a pattern of using insider knowledge for private gain through real estate transactions — even though, in fact, he had purchased the land in question after leaving public office. That argument, by its own terms, concedes that no specific statement about the land transactions was incorrect. It rather rests upon the notion that "actual malice" is

[62] Id. at 14. Thus, the Supreme Court in *Greenbelt* flatly rejected the contention that, by reporting comments including the word "blackmail" — which the defendants were said to have known was a crime that Bresler had not committed — defendants could be held liable for knowing or reckless disregard of falsity.

[63] At oral argument, counsel for Pierce suggested that it is inappropriate to employ the term "hyperbole" in the context of a television broadcast which purported, at least in part, to be a documentary program relating to issues of public concern. Yet, not only is the application of the principle of *Greenbelt* not limited in such a manner, but also its logic would appear to compel a broader rendering of it than Pierce's counsel would allow.

established by the fact that the defendants failed to rule out the possibility that Pierce used insider knowledge when buying land whose value was affected by decisions of the public agency on which he sat.

Pierce's contention thus hinges primarily on the *negative* implications said to flow from the program's treatment of his ownership of the three plots of land. Regarding the first parcel, however, as has been noted, the broadcast did provide the correct time sequence of Pierce's membership on the Port Authority and his later purchase of the real estate. In light of the fact that the publication was literally correct, it cannot fairly be said that, from the discussion about the land near the Commodore Barry Bridge, one may infer "actual malice" on the part of the defendants.

Mere lack of a statement of such time sequence as to the other two parcels of land in which Pierce had an interest cannot be held to establish the existence of "actual malice" on the defendants' part. For the remarks about Pierce's interests in the real estate on Ferry Avenue and in Woodbury explicitly included the phrase "*former* Camden Mayor and Port Authority Chairman." (emphasis supplied) We cannot agree with the plaintiff 's suggestion that "actual malice" is demonstrated simply by the fact that the modifier "former" was not placed before the title "Port Authority Chairman," but was situated before "Camden Mayor." Although there is arguably some ambiguity in the program regarding Pierce's membership on the Port Authority at the time of the real estate transactions, that alone, in our view, does not suffice to sustain the burden of establishing with convincing clarity knowing or reckless disregard of falsity.[64]

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[64] It is also implausible to say that the defendants' "actual malice" with respect to Pierce may be inferred from the fact that the television program included a comment by Bunting that buying land as a Port Authority Commissioner is questionable behavior. This is apparently an accurate portrayal of a citizen's views about an issue of public importance, and nowhere does the comment make reference to any particular individual.

Beyond the details relating to the various statements in the broadcast are fundamental principles of First Amendment jurisprudence compelling the conclusion that no actionable defamation occurred here. Since Pierce was a public official and did have, or at least appeared to the public to have, "substantial responsibility for or control over the conduct of governmental affairs,"[65] his claim lies within the heartland of defamation actions covered by *New York Times*. In addition, there is no doubt that the remarks in the telecast about Pierce were pertinent to his official conduct, for "anything which might touch on an official's fitness for office is relevant."[66] The fact that the program was not shown until after Pierce was out of office does not undermine these points.[67] Consequently, the strong First Amendment policy of protecting the free flow of ideas about public officials and their activities — even when some vehement or unpleasantly sharp comments may be involved — is fully operative.

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[65] *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

[66] *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

[67] The television program was in large part about decisions made at the time that Pierce was in office, and thus his official role was directly relevant. The passage of some three years between the time of Pierce's departure from the Port Authority and the airing of the broadcast did not, by itself, strip Pierce of his status as a "public official" for purposes of analyzing this case. Cf. *Time, Inc. v. Johnston*, 448 F.2d 378, 381 (4th Cir. 1971) ("[M]ere passage of time will not necessarily insulate from the application of *New York Times Co. v. Sullivan*, publications relating to the past public conduct of then a 'public figure.' No rule of repose exists to inhibit speech relating to the public career of a public figure so long as newsworthiness and public interest attach to events in such public career."). See also Bamberger, *Public Figures and the Law of Libel: A Concept in Search of a Definition*, 33 Bus. Law. 709, 723-24 (1978). It should be noted also that Pierce never suggested that he is not a public official in the context of the present appeal.

In view of these circumstances, and because the media such as are involved in this case personify the First Amendment values in the free exchange of ideas and open debate about public officials,[68] the publication challenged by Pierce should be protected by the First Amendment. Any other conclusion would have "disquieting implications for criticism of governmental conduct,"[69] for it would likely lead to the kind of chilling effect on the media that *New York Times* and its successors directly seek to avoid.[70]

E.

Thus, under Pennsylvania law as well as under federal constitutional standards, there is no basis for holding that the district court erred in granting the de-

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[68] See Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L. Rev. 199, 218-19 (1976), *quoting* Justice Stewart, *"Or of the Press"*, 26 Hastings L.J. 631, 634 (1975):

> [A] free press was not just a neutral vehicle for the balanced discussion of diverse ideas. Instead, the free press meant organized, expert scrutiny of government. The press was a conspiracy of the intellect, with the courage of numbers. This formidable check on official power was what the British Crown had feared — *and what the American founders decided to risk.* (emphasis supplied)

[69] *New York Times Co. v. Sullivan*, 376 U.S. 254, 291 (1964).

[70] The constitutional privilege enunciated in *New York Times* should not be conceived of by the media as a justification for careless reporting. Nonetheless, we must decide the issues put to us under the law as articulated first by the Pennsylvania courts and then by the Supreme Court, and in light of that and our review of the record, we have concluded that no recovery is warranted here. See *New York Times*, 376 U.S. at 285 & n.26. See also *Beckley Newspapers Corp. v. Hankes*, 389 U.S. 81, 82 (1967) ("[W]e have undertaken an independent examination of the record as a whole 'so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.' ").

fendants' motion for summary judgment. Consequently, the court's judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.